# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

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## NO. 627

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F. J. UTLEY AND D. T. UTLEY, APPELLANTS,

*vs.*

CITY OF ST. PETERSBURG, FLORIDA

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Appeal from the Supreme Court of the State of Florida.

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## BRIEF FOR APPELLANTS

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### I

### THE OPINIONS OF THE COURTS BELOW.

The opinion of the Florida Supreme Court herein sought to be reversed is reported in 149 So. 806. Said opinion, filed September 20th, 1933, is also found in the record at page 54. The order sustaining demurrers and dismissing the bill in the trial court is found at page 48 of the record.

### II

### STATEMENT OF THE CASE.

Matilda J. Utley, joined by her husband, D. T. Utley,

and D. T. Utley, as complainants in a cause previously instituted by them in the Circuit Court of Pinellas County, Florida, against the City of St. Petersburg, a municipal corporation, defendant, filed, on the 6th day of April, 1931, their amended and supplemental bill for cancellation of void paving certificates as a cloud on title and for injunctive relief (R. 1).

On the 4th day of May, 1931, a general and two special demurrers were filed to the said bill (R. 44 to 46, incl.). An order was entered June 1st, 1931, by the trial court, and recorded June 2nd, 1931, sustaining all three of said demurrers and dismissing the bill (R. 48).

Complainants appealed to the Supreme Court of Florida, and while the appeal was still pending and undetermined, D. T. Utley, one of the appellants, and F. J. Utley filed their petition for substitution of F. J. Utley, grantee, as appellant in the place and stead of Matilda J. Utley, deceased (R. 49), and stipulation of counsel showing service of a copy of the petition on appellee (R. 53). March 13th, 1933, an order was entered by the Supreme Court of Florida granting said petition and allowing the substitution of parties as prayed in the petition (R. 54).

September 20th, 1933, the Florida Supreme Court filed its written opinion affirming the lower court (R. 54), and from that opinion, after rehearing denied by said court, appeal to this Honorable Court has been allowed (R. 57).

A brief summary of the facts as they appear from the bill shows, among other things, the following:

That appellants were, and are, in actual possession (R. 17) and the owners, by proper deeds of conveyance, of the fee simple title of Lot Six (6), Block Eight (8), Central Park Subdivision, per plat of record in the Office of the

Clerk of the Circuit Court of Pinellas County, Florida, in Plat Book 1, page 39 (R. 2);

That said lot is situate on the South Side of First Avenue North in the City of St. Petersburg, Florida, between 47th and 48th Streets (R. 2), some forty blocks from the main business center of the City in a sparsely-settled section (R. 13);

That a street fifty feet wide was paved in front of appellants' property (R. 2, 3 and 20), and the entire cost assessed against the abutting property on both sides of the street, including property of appellants (R. 4, 5 and 22) by the front-foot rule (R. 3 and 4), and Notice of Lien dated September 6th, 1926, recorded by appellee against the property of appellants among the public records of Pinellas County, Florida, in Lien Book 21, page 363, and also recorded in Local Improvement Record 8, page 3, public records in the City Hall in the City of St. Petersburg, Florida (R. 4 and 5);

That the paving assessment complained of was levied without the existence of, and without the legislative determination of, any public convenience or necessity therefor (R. 16 and 17). Said assessment at $18.6895 per property foot was computed on the estimated cost $40,937.46 (R. 3) which exceeded the actual cost $30,206.17 (R. 4) by $10,731.29, and that the paving assessment complained of was levied against the abutting property of appellants in an amount greater by more than twenty-five per cent than the actual cost of the work, without the existence of benefits (R. 11 to 13, incl.), and without any legislative determination of benefits (see Assessment Resolution R. 22) by the front-foot rule (R. 3 and 12), all pursuant to and under the express terms, provisions and conditions of Chapter 9914,

Special Acts of the Legislature of Florida of 1923 (R. 8 to 13, incl., and 14 to 17, incl.), contrary to the rights of appellants under the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Federal Constitution, and under the privileges and immunities clause of said Amendment (R. 13).

Also, that $40,937.46 special improvement bonds, covering (R. 3) and, in fact, exceeding by more than twenty-five per cent the cost $30,206.17 of said paving (R. 4 and 17), included in a larger issue of bonds by the said City, were sold and delivered (R. 5 to 7, incl., for resolutions authorizing bonds see Exhibits "H" and "J", R. 25), and that certain of said bonds were delinquent as to both principal and interest (R. 7), and that the said City, under the mandatory provisions of said Chapter 9914, levied and assessed against the said property of appellants and ad valorem tax (R. 7, see Exhibit "K" for resolution R. 28) to pay interest and principal on said defaulted bonds (R. 7 and R. 31, Appropriation Ordinance Exhibit "L"), and that the levying of said assessment and recordation thereof, as well as the assessment of an ad valorem tax against their property, amounted to a taking of said property without due process of law, and to a denial of the equal protection of the laws, because appellants, as taxpayers, were denied the right to vote on issuance of bonds, denied any right to be heard at all, and forbidden the right to contest the validity or legality of the obligations (bonds) in any court, in any action or proceeding (R. 8, 11 and 12, and 17 and 18); that said liens and assessment cast clouds on the title of appellants to the said real estate and resulted in irreparable injury (R. 15). The bill further alleges that appellee threatens to foreclose said alleged assessment lien against appellants' property (R. 15).

The evils and wrongs visited upon the property and

rights of appellants by enforcement of the terms and provisions of said Chapter 9914, as made to appear in this cause, for refuge from which appellants must look to the protection of Amendment Fourteen to the Federal Constitution, are cumulative in their effect, and amount singly and in the aggregate to a denial of due process and of the equal protection of the laws, and to the enforcement of a law abridging the privileges and immunities of appellants as citizens of the United States, in violation of said Fourteenth Amendment.

A brief summary of the different provisions and sections of said Chapter 9914, complained of as being inimical to said Fourteenth Amendment, is as follows:

Section 1 provides that the city is to estimate and determine the cost of improvements to be raised by special assessments and may, by resolution, issue improvement bonds as the general obligation of the municipality in an amount not exceeding 70 per cent of such estimate; further, provides for compulsory levy of an ad valorem tax on all property in the city for debt service on defaulted bonds.

Section 2 of said Act provides that said bonds shall be excluded from any limitation of indebtedness prescribed by the charter of the city, or otherwise, and for compulsory levy of ad valorem tax to pay principal and interest on defaulted bonds.

Section 5 of said Act provides that said bonds shall be negotiable and shall not be invalid for any irregularity or defect in the proceedings and shall be incontestable in the hands of bona fide purchasers or holders for value.

Section 6 provides, among other things, that before issuing bonds the governing authority shall investigate and

determine the legality of the proceedings; and, further, provides that neither the municipality nor any taxpayer thereof shall be permitted to question the validity or legality of the obligation in any court, in any action or proceeding.

Section 7 provides that the bonds are not to be ratified or submitted to a vote of the electors of the City, and that bonds may be issued under this Act without respect to provisions of any other Act or Section of City Charter relative to the manner and sale of bonds.

Section 8 provides that this Act shall, without reference to any other Act of the Legislature of Florida, be full authority for the issuance and sale of bonds in the Act authorized * * * that no ordinance, resolution or proceeding in respect of the issuance of said bonds shall be necessary except such as is required by the Act; that no publication of any resolution, ordinance or proceeding relating to the issuance of bonds shall be required except such as is required by this Act.

Section 9 provides for the recordation of liens for special improvements and that no other record or notice shall be necessary to any person or corporation; further, provides that no error, omission, or mistake in regard to the name of the owner shall invalidate the assessment; provides for governing authority to hear objections after completion of work; provides, upon completion of any work * * and upon delivery of assessment list to Director of Finance, he shall publish notice once a week for two weeks of meeting of governing authority to hear and determine protests to said assessments.

Section 10 provides that said assessments shall be made and apportioned as the governing authority may determine

—and that governing authority may assess by the front-foot rule whole cost against abutting property.

Section 13 provides that governing authority is to hear and determine all the protests; governing authority shall confirm assessments which shall then be liens superior to all others except those for State and County taxes; that all persons failing to object to assessments in manner herein provided deemed to have consented to and approved same.

Section 14 provides for recordation of the assessment in the Office of the Clerk of the Circuit Court.

Section 15 provides that for thirty days after the date of confirmation of any special assessment, any person aggrieved shall have the right to contest the legality thereof by suit, action, writ, or special proceeding, after which time no suit, action, writ, or special proceeding, in any manner questioning the legality of said special assessment, shall lie for any cause whatsoever.

Section 16 provides that the assessment shall be due and payable within thirty days after confirmation.

Section 17 provides again for compulsory levying and collection of ad valorem tax on all taxable property within the city to pay interest and principal on defaulted bonds.

Section 18 provides for interest at 1 per cent per month in case of default in payment, and for compulsory acceleration of installments.

Section 19 provides for the manner of enforcing collection of assessments under said Act, and for attorney's fees; and, further, that the City shall not in any case be liable for such attorney's fees.

Section 20 provides in case of an invalid assessment that

repeated re-assessments shall be made until a valid assessment is obtained.

Section 21 provides that no omission, informality, or irregularity in the proceedings in, or preliminary to, the making of any special assessment shall affect the validity of same when confirmed. Record of assessment roll kept by City Clerk is competent and sufficient evidence that assessment is duly levied; assessment roll duly made and adopted and all other proceedings taken and performed according to this statute. No failure of Clerk to record the assessment roll, or to do any other act or thing by him required, shall in any way invalidate any assessment.

Section 22 provides again for re-assessment and collection thereof in case any assessment shall be adjudged invalid in the courts.

Section 23 provides for mandatory assessment and collection of ad valoreum tax to pay defaulted bonds.

Section 24 defines "local improvements."

Section 25 provides that said statute shall be a supplemental, additional, and alternative method of procedure.

Said Chapter 9914 is found in Vol. II, pages 2678 to 2690, inclusive, Special Acts of the Legislature of Florida of 1923. A duly exemplified copy of said Chapter 9914 is found in the record at pages 32 to 44, inclusive.

The prayer is for cancellation and injunction (R. 18 to 20, incl.) against the threatened enforcement and collection of said liens and assessment, because the action of the City, under and pursuant to the terms and conditions of said Chapter 9914, amounts to a taking of appellants' property without due process of law, and to a denial of the equal pro-

tection of the law, and that Chapter 9914 be held unconstitutional as not providing for due process and equal protection of the laws and as being a law, the making and enforcement of which abridges the privileges and immunities of appellants as citizens of the United States, contrary to the Fourteenth Amendment to the Constitution of the United States.

## III

## SPECIFICATION OF ERRORS.

1. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in the following particulars, and each of them, to-wit:

(a) In finding and holding that Chapter 14392, Special Acts of the Legislature of Florida of 1929, and Chapter 15511, Special Acts of the Legislature of Florida of 1931, validated and cured any defects in the special assessment complained of;

(b) In finding and holding that Chapter 14392, Special Acts of the Legislature of Florida of 1929, and Chapter 15511, Special Acts of the Legislature of Florida of 1931, validated and cured any defects in the special improvement bonds complained of against appellants as general taxpayers;

because Chapter 9914, Special Acts of the Legislature of Florida of 1923, under which the paving complained of was done, does not provide for due process and equal protection of the laws, under the First Section of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Florida erred in finding and

holding that the Act complained of (Chapter 9914, Special Acts of the Legislature of Florida of 1923) provides for due process of law under the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Florida erred in finding and holding that the special assessment under consideration and the issuance of certificates (bonds) did not constitute a taking of the property of appellants without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in holding that Chapter 9914, Special Acts of the Legislature of Florida of 1923, does not deny to appellants, as general taxpayers, due process of law, under the First Section of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in holding and finding that appellants were estopped from bringing suit for the following reasons, and each of them, to-wit:

(a) Chapter 9914, Special Acts of the Legislature of Florida of 1923, does not provide for due process and equal protection of the laws;

(b) The levy of the special assessment, issuance of bonds, and levy of general taxes to pay bonds, by appellee, amounts to a taking of appellants' property without due process and to a denial of the equal protection of the laws; and

(c) There is nothing in the record to show laches,

waiver or any element of estoppel in support of such finding;

all contrary to the rights of appellants under the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in the following particulars, and each of them, to-wit:

(a) In affirming the order of the trial court which sustained the special demurrer to the entire bill;

(b) In affirming the order of the trial court which sustained the general demurrer to the bill;

(c) In affirming the order of the trial court which sustained the special demurrer to such parts of the bill as sought to have Chapter 9914, Special Acts of the Legislature of Florida of 1923, declared unconstitutional and void; and

(d) In affirming the order and final decree of dismissal of the trial court;

all because Chapter 9914, Special Acts of the Legislature of Florida of 1923, does not provide for due process and equal protection of the laws under Amendment Fourteen, and because appellants have been denied due process and the equal protection of the laws in the manner of levying the special assessment, issuance of bonds and levying a general tax to pay said bonds, contrary to said Amendment Fourteen to the Constitution of the United States.

7. The Suupreme Court of Florida erred in its opinion

filed September 20th, 1933, in affirming the order and final decree of dismissal by the trial court, because Chapter 9914, Special Acts of the Legislature of Florida of 1923, is a statute passed and enforced by the State of Florida, which abridges the privileges and immunities of appellants as citizens of the United States, contrary to the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in failing to find and hold void the special assessment complained of (R. 22), for want of existence of, and want of legislative determination of, benefits in denial of the rights of appellants to due process and to the equal protection of the laws, under Amendment Fourteen to the Constitution of the United States, because the bill alleges, and the demurrers admit, want of benefits and want of any legislative finding of benefits.

9. The Supreme Court of Florida erred in its opinion filed September 20th, 1933, in failing to find and hold the ad valorem tax levy (R. 28) void, for want of provision in Chapter 9914, Special Acts of the Legislature of Florida of 1923, for the equal protection of the laws under Amendment Fourteen to the Constitution of the United States.

## IV

## ARGUMENT.

The law in question, Chapter 9914, Special Acts of the Legislature of Florida of 1923, is applicable in its terms only to the City of St. Petersburg, the appellee, and under its provisions the said City has done a large amount of paving and assessed the entire cost against abutting property

under the same or similar circumstances as alleged in the bill. In a large number of cases—perhaps, the majority, the amount of the assessment greatly exceeded the benefits, as well as the value of the property, and to enforce collection is absolute confiscation for such property owners. While, nominally, on the record, the question is between appellants, as property owners, and the City, as to whether they should be compelled to pay for the paving in question, the real question is whether the property of appellants and of others similarly situated shall be confiscated in order that the City may have paved streets for all, or whether the City at large must pay for its streets without such confiscation of the property of abutting owners. It is for this reason that we believe the case is of very great importance, out of all proportion to the number of litigants, amount of money, or quantity of land involved in this cause as disclosed by the record.

## SUMMARY OF POINTS TO BE ARGUED

Chapter 9914, Special Acts of the Legislature of Florida of 1923, under the terms of which the bonds were issued and sold, paving done, assessments levied and recorded and ad valorem tax levied for debt service on defaulted bonds, does not provide for due process of law, nor for the equal protection of the laws, and is a law the making and enforcement of which has abridged the privileges and immunities of appellants as citizens of the United States, contrary to their rights under Amendment Fourteen to the Constitution of the United States.

Said Amendment Fourteen to the Constitution of the United States provides, in Section 1 thereof, in part, as follows:

*"NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."*

*"Due process of law in this clause is the law of the land in each state."*

Hurtado vs. Calif.,
110 U. S. 535.

*And this process in the United States is regulated by the law of the state.*

Walker vs. Sauvinet,
92 U. S. 92.

*"In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if*

*found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'* "

Davidson vs. New Orleans,
96 U. S. 107.

"*What must constitute a denial of the equal protection of the law will depend in a large measure upon what rights have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises.*"

Nashville etc. R. Co. vs. Taylor,
86 Fed. 168.

Certiorari denied.
172 U. S. 647.

It becomes material, therefore, to inquire into the law of the State of Florida respecting the issue and sale of special improvement bonds by municipalities and the levying of general tax and of special assessments against abutting property for local improvements. This law is reflected in the Constitution of the State of Florida, and in the decisions of its Supreme Court.

Applicable provisions of the Florida Constitution are as follows:

Section 4, of the Declaration of Rights, reads, in part, as follows:

> *"All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law."*
>
> "Constitutional guaranty of courts open to redress wrongs forbids invasion by State."
>
> Spafford vs. Brevard County,
> 92 Fla. 617.

Article III, Section 20, reads, in part, as follows:

> *"The Legislature shall not pass special or local laws in any of the following enumerated cases, that is to say * * regulating the practice of courts of justice, except municipal courts."*

Article III, Section 21, reads, in part, as follows:

> *"In all cases enumerated in the preceding section, all laws shall be general and of uniform operation throughout the State."*

Article V, Section 1, reads, in part, as follows:

> *"The judicial power of the State shall be vested in a Supreme Court, Circuit Courts, etc."*

Article V, Section 11, reads, in part, as follows:

> *"The Circuit Courts shall have exclusive orig-*

*inal jurisdiction in all cases * * involving the legality of any tax, assessment, or toll."*

Article II reads as follows:

*"Distribution of Powers.—The powers of the government of the State of Florida, shall be divided into three departments; Legislative, Executive and Judicial; and no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, except in cases expressly provided for by this Constitution."*

"Where the Legislature passes an Act, the provisions of which are clearly and manifestly an exercise of power properly belonging to the judiciary, it is unconstitutional."

Trustees Internal Imp. Fund vs. Bailey,
10 Fla. 238.

Article III, Section 16, reads, in part as follows:

*"Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."*

Article IX, Section 5, reads, in part, as follows:

*"The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the princi-*

*ples established for State taxation. But the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits.*"

"Legislature may not delegate power to enact law or to declare what law shall be or to exercise unrestricted discretion in applying the law."

State ex rel. Davis Atty. Gen. vs. Fowler et al.,
94 Fla. 752.

"Acts may be declared constitutional or unconstitutional only by the Courts."

State ex rel. Nuveen vs. Greer et al.,
88 Fla. 249.

"Tax statutes must be construed strictly in favor of the taxpayer."

A. C. L. Ry. Co. vs. Amos, State Comptroller,
94 Fla. 120.

"Statutory regulations which do not afford reasonable notice and hearing before adjudication or before liability is established deprive of organic rights without due process of law and are inoperative."

Tibbetts vs. Olson et als.,
91 Fla. 824.

"This procedure relates to issuing certificates of indebtedness and does not clearly appear to afford a sufficient notice and an opportunity to be heard as to the validity and reasonableness of the projects or as to the benefits to the abutting property and the use of the road by the public, which hearing should appropriately be had before the improvement is provided or the assessment made."

Smith Bros., Inc., vs. Williams et al.,
100 Fla. 642.

"The taxing authority attempted to be conferred upon the Board is not limited by legislative provisions and the statute exceeds legislative authority."

Stewart vs. Daytona & New Smyrna Inlet Dist. et al.,
94 Fla. 859.

"Municipality's power to tax for paving streets and sidewalks rests upon public necessity."

A. C. L. R. Co. vs. City of Lakeland,
94 Fla. 347;

City of Fort Myers vs. State,
95 Fla. 704.

"Special assessment should not substantially exceed benefit reasonably expected."

Martin, Governor, et al. vs. Dade Muck Land Co.,
95 Fla. 530 (Syl. 20);

A. C. L. R. Co. vs. City of Lakeland, Supra.

"Before adopting resolution authorizing public improvements and bonds therefor, city commission must determine benefits will accrue to property involved, amount thereof, manner of prorating and that special assessments will be made proportionate to benefits."

City of Fort Myers vs. State,
95 Fla. 704.

"If a highway improvement is primarily for the benefit of the public and only secondarily or incidentally beneficial to abutting property, the imposition of the entire expense of the improvement upon the owners of the abutting property would be a violation of organic property rights."

Parrish vs. Hillsborough County et al.,
98 Fla. 430.

"Statute charging entire highway improvement cost against abutting property other than government-owned property held invalid as imposing entire cost on abutting property without reference to benefits."

Parrish vs. Hillsborough County et al.,
Supra.

"If reasonable doubt exists as to a particular power of a municipality it should be resolved against the city."

Malone vs. City of Quincy,
66 Fla. 52;

Ex Parte Davidson,
76 Fla. 272.

The following sections of Chapter 9914 invade the rights of appellants under the following provisions of the Florida Constitution, and are contrary to the law of the land:

Section 6 closes the courts to appellants, contrary to Section 4 of the Declaration of Rights. Section 6 invades the powers of the judiciary in delegating to the governing authority investigation and determination of validity of proceedings before issuing bonds contrary to Section [illegible], Article V, and Article II.

Section 19 attempts to regulate the practice in courts of justice contrary to Sections 20 and 21, Article III, which prohibits regulation of the practice in courts of justice by special act. Section 19 also provides for attorney's fees contrary to Article III, Section 16.

No hearing of any kind is provided at any time for the general taxpayer by any of the provisions of said Chapter 9914, and Section 6 denies him access to the courts, while Section 7 denies him the right as an elector to ratify by vote the issuance of bonds. Sections 1 and 2 make levy of ad-valorem taxes for debt service on defaulted bonds mandatory, and Sections 7 and 8 provide that said Chapter 9914 shall be sufficient authority unto itself for the issuance of bonds without reference to any other law. Section 2 pro-

vides that the bonds issued thereunder shall be excluded from any and all limitation of indebtedness.

Sections 5, 9 and 21 provide that no error, omission or informality in proceedings shall affect the validity. Section 10 provides that assessment may be levied as the governing authority shall determine. In the instant case they determined to levy it without the existence of, or legislative determination of, any public convenience or necessity, and without the existence or legislative determination of benefits to the property assessed.

No hearing as to benefits was had or even provided for until after the work was completed and $40,937.46 special improvement bonds in an amount greater than the cost of the work $30,206.17 (R. 4 and 17) had been issued and sold by the City, and the total assessments made on the amount of bonds which was more than twenty-five per cent greater than the cost of the work. After work done and bonds issued for more than the cost of the work, the governing authority is not a proper or impartial tribunal to hear complaints of property owners, as they would, at that stage of the proceedings, be more influenced by a desire to uphold the validity of their own completed acts than by a desire to give a fair hearing to the protests of property owners.

No provision is made in the Act for notice of any kind to the owner of the property proposed to be assessed until after bonds issued and sold and work completed, and, unless the notice and hearing after bonds issued and sold and work completed and assessment list delivered and recorded as a lien by the Director of Finance in the assessment book for local improvements, is in accord with the law of the land, the property owner has been deprived of his property by the City without due process of law, and has been denied the

equal protection of the laws under the Fourteenth Amendment.

Section 15 provides a supposed thirty-day statute of limitations after confirmation. Section 16 provides that the assessment shall be payable in thirty days after confirmation so that suit to contest the assessment is barred for any cause whatsoever on the same day it becomes due and payable. It would seem, then, that Section 15 provides a no-day statute of limitations while purporting to be a thirty-day statute of limitations.

Section 21 provides that no failure by the City Clerk to do any act or thing by him required shall in any way invalidate any assessment. Section 9 provides that the Director of Finance, who is the City Clerk, shall publish notice of hearing for protests and confirmation of assessments. The rights of the property owner are so lightly regarded in the statute that Section 21, as well as other sections, provides that no failure to do any act or thing by him required shall in any way invalidate the assessment.

Section 22 provides that in case any special assessment shall be adjudged invalid in any suit the governing authority may make and collect a new assessment in the place and stead of the assessment which shall have been adjudged invalid.

In fact, the provisions of Chapter 9914 are alike in that each section takes away some of the rights of appellants piece-meal, so that they have no rights under said statute. Section 22 says, in effect, to appellants that should, in any suit, the court adjudge the special assessment against your property to be invalid and unconstitutional, it will avail you nothing because the City is given the right to make and collect a new assessment in place of the one held invalid and to

make such new assessment, with power to collect, time without number in spite of any court ruling.

"A statute by the terms of which it may be possible for the total amount assessed to exceed the total benefits has been held to be unconstitutional irrespective of its effect in the particular case."

White vs. Gove,
183 Mass. 333.

"A statute which endeavors to make a legislative determination of benefits final is necessarily unconstitutional."

Bidwell vs. Huff,
103 Fed. 362.

*"Equal protection of the laws forbids that one class suffer loss to enrich another."*

Reagan vs. Farmers Loan & T. Co.,
154 U. S. 362.

*"A hearing granted as a matter of favor or discretion cannot be deemed as a substantial substitute for the due process of law that the Constitution requires."*

Coe vs. Armour Fertilizer Works,
237 U. S. 413.

*"An opportunity to be heard in proceedings for taxation upon such notice as is usual in such proceedings is essential to due process of law."*

Pittsburgh etc. R. Co. vs. Backus,
154 U. S. 421.

*"Owners do have the right (to be heard as to benefits) where the district is not created by the legislature and there has been no legislative determination that their property will be benefitted by the improvement."*

Browning vs. Hooper,
269 U. S. 396.

The Supreme Court of Florida erred in its opinion (R. 54), in finding and holding that Chapter 14392, Special Acts of the Legislature of Florida of 1929 (Vol. II, page 1972), and Chapter 15511, Special Acts of the Legislature of Florida of 1931 (Vol. II page 1725), validated and cured any defects in the special assessment complained of and in the special improvement bonds complained of against appellants as general taxpayers.

The Special Acts above referred to are curative Acts, and not legislative assessments.

Utley vs. City of St. Petersburg,
144 So. 53 at 56.

The bill alleges, among other things, that the paving was done and the assessment complained of levied without the existence of and without the legislative determination

of any public necessity or convenience therefor (R. 16), and that the paving assessment complained of was levied against abutting property of appellants by the front-foot rule (R. 3 and 12), without the existence of benefits (R. 11 to 13, incl.), and without any legislative determination of benefits (Authorizing Resolution R. 20, Assessment Resolution R. 22), all pursuant to and under the express terms and conditions of Chapter 9914, Special Acts of the Legislature of Florida of 1923 (R. 8 to 13, incl., and 14 to 17, incl.), contrary to the rights of appellants under the due process and equal protection of the laws clauses of the Fourteenth Amendment to the Federal Constitution, and under the privileges and immunities clause of said Amendment (R. 12 and 13).

The demurrers filed to the bill by appellee (R. 44 to 46, incl.) admit, under the Florida practice, all the foregoing allegations.

Reid et al. vs. Barry,
93 Fla. 849.

The record discloses that there was never any legislative determination of special benefits accruing to the property involved in this suit.

The language of the ordering-in and assessment resolutions quoted and judicially construed by the Supreme Court of Florida in Utley vs. City of St. Petersburg, Supra., is identical and interchangeable with the language of the ordering-in (R. 20) and assessment resolutions (R. 22) in this case. The court held that such language did not amount to a legislaitve finding of benefits, and that the said curative Acts in question were, therefore, inapplicable.

Chapter 14392, Special Acts of the Legislature of Florida of 1929 (Vol. II page 1972) provides:

> "That all proceedings in the assessment and levy of taxes levied and imposed by the City of St. Petersburg on property taxable by it to and including the taxable year 1928, as also all taxes assessed and levied by said City of St. Petersburg on property taxable by it for each taxable year up to and including the taxable year 1928 be, and the same are hereby ratified, validated and confirmed. All laws and parts of laws in conflict herewith be, and the same are hereby repealed."

Chapter 15511, Special Acts of the Legislature of Florida of 1931 (Vol. II page 1725) provides as follows:

> "That all special assessments levied and imposed by the City of St. Petersburg, and also all certificates of indebtedness issued by the City of St. Petersburg prior to this Act becoming effective, be and the same are hereby ratified, validated and confirmed. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its becoming a law without such approval."

Neither of the above curative Acts purports in the terms thereof to validate or cure any defects in special improvement bonds and are each inapplicable by their own terms to the special improvement bonds complained of. Said Chapter 14392 purports, on its face, only to cure tax assessments up to and including the year 1928. The ad valorem tax complained of was levied in the year 1930 (R. 7 and 28),

and hence Chapter 14392 is not, and could not be, applicable even to cure the defect in the ad valorem tax levied two years thereafter, to say nothing of the fact that it does not purport to cure defects in the issuance of the special improvement bonds complained of. Chapter 15511 purports, on its face, only to cure defects in certificates of indebtedness; special improvement bonds are not even mentioned.

The special improvement bonds herein are negotiable in form and contain a definite promise and time of payment, whereas certificates of indebtedness are non-negotiable in form and contain only a guaranty of payment by the municipality, indefinite as to time.

McQuillin, Municipal Corporations, 2nd Ed., Sections 2436 and 2443;

Chapter 6864, Sections 1 and 2, Acts of the Florida Legislature of 1915 (Vol. 1, page 131);

Chapter 6772, Section 108, Special Acts of the Florida Legislature of 1913 (Vol. II, page 1012).

The question of estoppel referred to by the Florida Supreme Court is not supported by the record. It appears that an amended and supplemental bill was filed April 6th, 1931. It appears from Exhibit "E" (R. 22) that the assessment complained of was levied September 6th, 1926. The record does not disclose when the suit was begun but it does appear that it was a previously instituted and pending suit on April 6th, 1931, when the amended and supplemental bill was filed. If the law in question is unconstitutional, it is immaterial, however, when the suit was, in fact, instituted.

*"Non action could not estop property owners from contesting assessment where they could have had no notice of the proposal to assess their lands until publication of notice to assess benefits."*

Risty vs. Chicago R. I. & P. Ry. Co.,
270 U. S. 378.

Chapter 9914 involves an arbitrary, intentional and systematic discrimination as between the levying of an ad valorem tax for debt service on defaulted bonds and the levying of a general or ad valorem tax for other purposes.

Cumberland Coal Co. et als. vs.
Board of Revision of Tax Assessments
in Greene County, Pa.,
284 U. S. 23.

*"It is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard."*

Merchants' Nat. Bank vs. Richmond,
256 U. S. 635.

## SUMMARY

We respectfully submit that it appears from the pleadings and is admitted by demurrer that the paving assessment complained of was levied without the existence of and without the legislative determination of any public convenience or necessity, and that the assessment was levied against appellants' property without the existence of, and without the legislative determination of any benefits; that the amount of the assessment was based on the estimated cost which exceeded the actual cost by more than twenty-five per cent, and that bonds were issued and sold covering the estimated cost of the work which was more than twenty-five per cent greater than the actual cost, and that the ad valorem tax has been levied against appellants' property for debt service on defaulted bonds, all without notice or hearing of any kind to appellants; that the above mentioned acts were done and performed by the appellee under the express terms and provisions of Chapter 9914, Special Acts of the Legislature of Florida of 1923, and that said Chapter 9914 is unconstitutional, as not providing for due process of law and for the equal protection of the laws to appellants in the matters above mentioned, and as being a law the making and enforcement of which has abridged the privileges and immunities of appellants as citizens of the United States, all contrary to their rights under the Fourteenth Amendment to the Constitution of the United States.

## CONCLUSION

Upon the whole case, we, therefore, respectfully submit that the allegations of the bill admitted by demurrer make out a case calling for the exercise by this Court of its supervisory powers, to the end that inquiry be made whether Chapter 9914, Special Acts of the Legislature of Florida of

1923, as applied and enforced by appellee in levying the special assessment issuing bonds thereon and levying ad valorem tax for debt service against appellants' property, provides for and achieved due process of law; and whether it provides for and achieved the equal protection of the laws, and whether said Chapter 9914 is a law the making of which and enforcement against the property of appellants has bridged the privileges and immunities of appellants as citizens of the United States, contrary to their rights under the First Section of the Fourteenth Amendment to the Constitution of the United States;

That to such end an appeal herein should be granted and this Court should review the decision of the Florida Supreme Court and finally reverse it, is

Most respectfully submitted,

LLOYD D. MARTIN,
*Counsel for Appellants.*